

**A Haji Abdul Rahim bin Mohamad Mohideen & Anor v
 Abdul Rahman bin Mohamad & Anor**

**B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-12 OF
 1994
 ABDUL AZIZ MOHAMAD J
 22 AUGUST 2008**

**C *Contract — Breach — Shares — Sale and purchase of shares — Whether
 agreement signed by nominee binding — Whether established***

**D This action arose out of the sale of shares in KM Rahim Enterprise Sdn Bhd,
 where the first plaintiff ('Haji Rahim') was the beneficial owner. The plaintiffs
 claimed against the defendants for a sum of RM677,612.02 representing the
 unperformed obligations under the second and third agreements. Although
 the agreements were signed by Kadir and not by Rahman, the plaintiffs
**E claimed that Kadir entered into those agreements as Rahman's 'nominee'.
 According to Haji Rahim, Rahman had negotiated in the purchasing of the
 shares. However, the agreement was signed by Kadir, Rahman's brother,
 because, being an employee of a bank, Rahman was not allowed to sign the
 said agreements. Judgment in default of appearance had been entered against
**F Kadir and the trial proceeded against Rahman. In his defence, Rahman
 alleged that he was not liable under the second and third agreements because
 he was not a party to them nor had he appointed Kadir as his nominee to
 enter into those agreements. The sole issue before the court was whether
 Kadir had signed the agreements as Rahman's agent. As for proof of the sums
**G claimed, it had been agreed between the parties that the justification of the
 claim and the determination of the correctness of the amount would be
 decided by the registrar should Rahman be found liable as a party to the said
 agreements.********

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Held, allowing the plaintiffs' claim with costs:

- I (1) The fact that Rahman was not registered in respect of any of the shares
 and was not a director and did not take part in the running of the
 company did not necessarily mean that it was not Rahman who was
 liable under the agreements as a contracting party and that Kadir did
 not sign the agreements as Rahman's nominee (see para 28).**

- (2) The creditworthiness of Rahman's evidence was questionable. It was concerning the holding of 75,000 shares by Rahman's wife, Zaitun. She testified that she knew nothing about the shares, that although she was a director she knew nothing about the business and that she only knew about the shares in her name on the day when she gave her evidence. However, according to Kadir's evidence, before the transfer, he had spoken to Zaitun several times on the telephone explaining to her about the transfer. As for Rahman, his evidence in cross-examination was that he did not know for whom his wife held the shares (see paras 29–32).
- (3) After considering together the evidence of Zaitun, Kadir and Rahman, the conclusion was that each one of them was trying to hide the truth as to the ownership of the 75,000 shares. On a balance of probabilities, the court finds that the shares were held for Rahman and that Kadir had signed the second and third agreements as Rahman's nominee and accordingly, Rahman was liable under them (see paras 33–34).

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[Bahasa Malaysia summary]

Tindakan ini berbangkit daripada penjualan saham di dalam KM Rahim Enterprise Sdn Bhd, di mana plaintif pertama ('Haji Rahim') adalah pemilik benefisial. Plaintif-plaintif memohon terhadap defendan-defendan sejumlah RM677,612.02 yang mewakili hutang yang tidak dijelaskan di bawah perjanjian-perjanjian kedua dan ketiga. Walaupun perjanjian-perjanjian tersebut ditandatangani oleh Kadir dan bukan oleh Rahman, plaintif-plaintif menuntut bahawa Kadir memasuki perjanjian-perjanjian tersebut sebagai 'nominee' Rahman. Menurut Haji Rahim, Rahman telah berunding dalam pembelian saham-saham tersebut. Walau bagaimanapun, perjanjian tersebut ditandatangani oleh Kadir, adik Rahman kerana sebagai seorang pekerja bank, Rahman tidak dibenarkan untuk menandatangani perjanjian-perjanjian tersebut. Penghakiman ingkar kehadiran telah dimasukkan terhadap Kadir dan perbicaraan diteruskan terhadap Rahman. Di dalam pembelaannya, Rahman mendakwa bahawa dia tidak bertanggungjawab di bawah perjanjian-perjanjian kedua dan ketiga kerana dia bukan pihak kepadanya dan tidak melantik Kadir sebagai wakilnya untuk memasuki perjanjian-perjanjian tersebut. Satu-satunya isu di mahkamah ini adalah sama ada Kadir menandatangani perjanjian-perjanjian tersebut sebagai agen Rahman. Bagi membuktikan jumlah yang dituntut, ia telah dipersetujui di antara pihak-pihak bahawa justifikasi tuntutan dan penentuan mengenai betulnya jumlah akan diputuskan oleh pendaftar jika Rahman didapati bertanggungjawab sebagai pihak kepada perjanjian-perjanjian tersebut.

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Diputuskan, membenarkan tuntutan plaintif dengan kos:

- (1) Fakta bahawa Rahman tidak didaftarkan berkaitan dengan apa-apa

- A saham dan bukan seorang pengarah dan tidak mengambil bahagian di dalam pengurusan syarikat tidak semestinya bermaksud bahawa bukan Rahman yang bertanggungjawab di bawah perjanjian-perjanjian tersebut sebagai pihak yang membuat perikatan dan bahawa Kadir tidak menandatangani perjanjian-perjanjian tersebut sebagai wakil Rahman (lihat perenggan 28).
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- (2) Kebolehpercayaan keterangan Rahman boleh dipersoalkan. Ia adalah berkaitan dengan pegangan 75,000 saham oleh isteri Rahman, Zaitun. Dia memberi keterangan bahawa dia tidak mengetahui tentang saham-saham tersebut, bahawa walaupun dia adalah seorang pengarah dia tidak mengetahui perniagaan tersebut dan bahawa dia hanya mengetahui tentang saham-saham di dalam namanya pada hari dia memberi keterangan. Walau bagaimanapun, menurut keterangan Kadir, sebelum pindah milik, dia telah bercakap dengan Zaitun beberapa kali melalui telefon menjelaskan kepadanya tentang pindah milik tersebut. Berkenaan dengan Rahman, keterangannya di dalam pemeriksaan balas adalah bahawa dia tidak mengetahui untuk siapa isterinya memegang saham-saham tersebut (lihat perenggan 29–30).
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- E (3) Selepas mempertimbangkan bersama keterangan Zaitun, Kadir dan Rahman, kesimpulannya adalah bahawa setiap seorang dari mereka cuba menyembunyikan kebenaran mengenai pemilikan 75,000 saham. Atas imbalan kebarangkalian, mahkamah mendapati bahawa saham-saham tersebut dipegang untuk Rahman dan bahawa Kadir telah menandatangani perjanjian-perjanjian kedua dan ketiga sebagai wakil Rahman dan oleh yang demikian, Rahman bertanggungjawab di bawah perjanjian tersebut (lihat perenggan 33–34).]
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Notes

- G For cases on shares, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2701–2702.

Legislation referred to

Evidence Act 1950 s 92

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MS Murthi (Murthi & Partners) for the plaintiffs.
Yahya Abd Rahman (SA Helmy & Partners) for the first defendant.

Abdul Aziz Mohamad J (now FCJ):

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[1] This action arose out of the sale of shares in KM Rahim Enterprise Sdn Bhd ('the company'), which manufactured and sold computer and typewriter ribbons, and stationery, and had 250,000 issued and paid-up shares of all of

which, although held in the names of the two plaintiffs and their son, the first plaintiff ('Haji Rahim') was the beneficial owner. There are three agreements that relate to the sale.

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[2] The first agreement is dated 22 August 1989 and is between the three shareholders as the vendors and the first defendant ('Rahman') as the purchaser. It is for the sale of 70% of the 250,000 shares, that is, 175,000 shares (mistakenly stated as 187,500 in the agreement). It provides for the payment of a deposit of RM5,000, which was paid. The purchase price is not stated but was to be determined only after the purchaser had examined the accounts of the company, when a new agreement would be entered into to conclude the purchase. The completion date was three months from the determination of the purchase price and stock-taking by the purchaser.

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[3] The second agreement is dated 22 January 1990 and is between the two plaintiffs, that is, Haji Rahim and his wife, as vendors, and the second defendant ('Kadir'), Rahman's younger brother, as purchaser. It makes no reference to the first agreement. It is for the sale of 175,000 shares (70% of the shareholding) for RM623,000, of which RM100,000 was paid and the balance of RM523,000 was to be paid within three months of the date of the agreement, that is, by 22 April 1990.

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[4] The third agreement is dated 10 July 1990 and is between the same parties as in the second agreement and is called supplemental agreement. It provides for the extension of the completion date, which was 22 April 1990, under the second agreement, to a past date, 26 June 1990. The balance purchase price for the 175,000 shares had been duly paid by that date.

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[5] Clause 1 of the third agreement requires the purchaser to pay the vendors RM300,000 in consideration of the extension of the completion date. In this action the parties have agreed that of that sum RM120,000 remains unpaid.

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[6] By the third agreement, the remaining 30% of the shares, that is, 75,000 shares, were sold for RM267,000. The price was paid.

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[7] Clause 6 of the third agreement provides as follows:

The Purchaser hereby agreed [sic] with the Vendors that the Vendors shall be entitled to take out all stocks of the company in excess of Ringgit Six Hundred and Fifty Thousand (M\$650,000) only (hereinafter referred to as 'the Excess Stocks') and be placed in another premises of the Vendors; provided always that the Purchaser shall be entitled to all proceeds of sale of the Excess Stocks after deducting five percent (5%) and the costs of the Excess Stocks.

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A [8] Clause 8 of the third agreement provides as follows:

The Vendors hereby undertake with the purchaser that they shall not carry on any business similar to the business of the Company within the vicinity of Kuala Lumpur and Petaling Jaya for a period of three (3) years from the execution of this Supplemental Agreement.

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[9] In this action the plaintiffs' claim comprises four sums which para 17 of the statement of claim says represent unperformed obligations under the second and third agreements. The first sum is the sum of RM120,000 earlier mentioned.

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[10] The second is a sum of RM15,000 said in para 17 of the statement of claim to be 'bad debts under para 17' (actually para 16) of the statement of claim. There is no provision for bad debts in either the second or third agreement but para 16 of the statement of claim says as follows:

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It was also agreed between the parties that the defendants will pay over to the plaintiffs any of the bad debts collected. The defendants had collected \$30,000 of the bad debts of which \$15,000 only had been paid over to the plaintiffs. Accordingly the defendants are liable to transmit to the plaintiffs a sum of \$15,000 being the balance of the bad debts collected by the defendants.

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The statement of claim does not indicate whether the alleged agreement about bad debts was made in relation to the second agreement or the third agreement. Neither is this clear from Haji Rahim's evidence.

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[11] The third sum relates to cl 6 of the third agreement. Paragraph 17 of the statement of claim sets out three sums as representing the stock position: RM537,875.76 'Stationery Book as of 30 June 1990', which I suppose was the date when the company changed hands; RM584,673.21 'Ribbon Book as of 30 June 1990', and RM67,063.05 'Cash Bills'. Those three sums total RM1,189,612.02. From that total is deducted the sum of RM650,000 stated in the said cl 6. The balance of RM539,612.02, designated in para 17 of the statement of claim as 'Balance Stocks', is the third sum.

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[12] The fourth is a sum of RM3,000, designated in para 17 of the statement of claim as 'Personal money in account'. There is no provision for this in either the second or third agreement and Haji Rahim has not explained this sum in his evidence.

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[13] The four sums (RM120,000, RM15,000, RM539,612.02, RM3,000) total RM677,612.02, and that is the plaintiffs' claim in this action.

[14] The plaintiffs' claim was brought against Rahman and Kadir. Although it was Kadir who signed the second and third agreements and not Rahman, the plaintiffs claim that Kadir entered into those agreements as Rahman's 'nominee'. Judgment in default of appearance has been entered against Kadir. The trial proceeded only as against Rahman.

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[15] Rahman's defence is that he is not liable under the second and third agreements because he is not a party to them and he never appointed Kadir as his nominee to enter into those agreements. He also calls for proof of the sums claimed.

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[16] As for proof of the sums claimed, it has been agreed between the parties that the trial was to determine only the question of Rahman's liability. I have already stated the sums claimed by the plaintiffs and made remarks about them. In view of the agreement between the parties, the justification for claiming those sums and the determination of the correctness of the amounts will be decided by the Registrar should Rahman be found liable, that is, liable as a party to the second and third agreements, but bearing in mind that the parties have agreed that a sum of RM120,000 remains unpaid of the sum of RM300,000 under cl 1 of the third agreement.

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[17] As regards the question of liability, it is not Rahman's case that since the second and third agreements were not signed by him, he is absolutely not liable and therefore the plaintiffs are precluded from claiming that he is nevertheless liable because Kadir entered into those agreements as his nominee. He, however, in his written submission raises s 92 of the Evidence Act 1950 as precluding the plaintiffs from claiming that Kadir was his nominee. The section concerns the contradicting, varying, adding to, or subtracting from the terms of a written contract by oral evidence. In my judgment the section does not apply in this case because the plaintiffs do not seek to make any changes in the terms of the second and third agreements, and in seeking to prove that Kadir signed the second and third agreements as Rahman's nominee, the plaintiffs are not seeking to make such a change. Therefore the only question that I have to decide is whether Kadir was Rahman's nominee.

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[18] Before proceeding to consider that question, I will dispose of two other points raised by Rahman in his written submission. One point is that the plaintiffs had breached cl 8 of the third agreement. Haji Rahim admitted in cross-examination that within three years of the third agreement he did start another business for his son, which was registered in his son's name and which he helped to manage because his son was still young at 18 years, but denied that because of the son's business, the business of the company that the plaintiffs sold failed. In re-examination Haji Rahim said that only two

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- A customers of the company went to the son's business and that was because they did not get any business from the company. Kadir said that he had been paying the balance of RM200,000 of the sum of RM300,000 under cl 1 of the third agreement, RM100,000 having already been paid, by monthly instalments of RM13,333 but, after paying six instalments, thereby leaving
- B the balance of RM120,000 mentioned earlier, he stopped paying further instalments, because Haji Rahim opened the other business. Kadir said that it was the same business as the company's business, and was under a company and was in Brickfields.
- C [19] I am not disposed to take the alleged breach into account because Rahman, in the short paragraph at p 5 of his written submission in which the point is raised, has not submitted on what is the consequence in law of the breach on the second and third agreements, or on the plaintiffs' claim, and has, moreover, not raised the breach as a defence in his statement of defence.
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- E [20] Another point raised by Rahman is that having obtained judgment against Kadir, the plaintiffs cannot now make Rahman liable. Again I am not disposed to consider this point because Rahman has not supported it with any authority and, moreover, it is a point of election which Rahman has not, after judgment was entered against Kadir, sought to plead by an amendment of the statement of defence.
- F [21] I turn now to the question whether Kadir was Rahman's nominee. By 'nominee' I understand the parties in this case to mean a person who has been nominated that is, named or appointed by another. Did Kadir sign the second and third agreements as a person named or appointed by Rahman to do so? It virtually boils down to the question whether Kadir signed the agreements as Rahman's agent.
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- H [22] The evidence of Haji Rahim is as follows. It was Syed Mubarak, the company's auditor, who, knowing that Haji Rahim was desirous of selling the company, introduced Rahman to Haji Rahim as a ready buyer. That was about six months before the first agreement was signed on 22 August 1989.
- I About a week after Syed Mubarak introduced Rahman, Rahman came to Haji Rahim's office and said that he was interested to buy. A few months after the first agreement was signed, Rahman told Haji Rahim that he wanted to buy the business so that his family members could run it. Rahman, Haji Rahim said, explained to him that he was then a manager of BBMB (Kewangan) but he might lose his managerial post and be transferred to some training centre because he did not have a degree and a new Bank Negara regulation required a degree for a managerial position. If he was transferred, he would leave his job and carry on the business. Haji Rahim further said that he had never spoken with or seen Kadir and that he negotiated certain terms

of the second and third agreements with Rahman and not Kadir. When the second agreement was signed by the vendors on 22 January 1990, Rahman was present, but Kadir was not, but Kadir's signature was obtained subsequently in Butterworth through Syed Mubarak or through Rahman. In cross-examination Haji Rahim said, in reference to the second agreement, that Rahman told him that he was bringing in his brother Kadir as a nominee, which Haji Rahim understood was because, being an employee of a bank, he was not allowed to sign the agreement. Haji Rahim said that although he intended to contract with Rahman and did not intend to contract with Kadir, he did not object to the agreement being signed by Kadir because he trusted Rahman and did not foresee that any problem would arise later. For a better understanding of Rahman's occupation, I will mention that according to Rahman himself he was an employee of BBMB who was on secondment to BBMB (Kewangan) and was the CEO of the latter organisation.

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[23] Syed Mubarak, who was the plaintiffs' witness, confirmed that Rahman wanted to buy a business for his family and that it was Syed Mubarak who introduced Rahman to Haji Rahim. According to Syed Mubarak, who had certain responsibilities in the negotiations for the agreements and in their implementation, it was always Rahman who gave him instructions on the purchaser's side and it was always Rahman who came to see him although occasionally Kadir would come along too.

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[24] I pause to observe that what the evidence of Haji Rahim and Syed Mubarak mostly shows is that Rahman was interested in buying the shares in the company and that he was the only one who carried out the negotiations that resulted in the signing of the three agreements. But as to the capacity in which Kadir signed the second and third agreements the only direct evidence came only in the cross-examination of Haji Rahim when he said that Rahman told him that he was bringing in Kadir to sign as his nominee. Although the cross-examination was in relation to the second agreement, I take it that if Rahman did in fact tell Haji Rahim that he was bringing in Kadir as his nominee, it would be for signing the third agreement as well.

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[25] Rahman denied telling Haji Rahim that, and the denial was also in cross-examination. Rahman's evidence in examination-in-chief is that his sister Fatimah wanted to go into business and that he, Rahman, knowing from Syed Mubarak that the company was for sale, proposed to Fatimah that she consider buying, and Fatimah agreed. Fatimah and Kadir obtained personal loans from Maybank to finance the purchase, 70% of the shares being part of the security for the loan. Although some of the shares were registered in Kadir's name, in effect all the shares were Fatimah's. Rahman maintained that he had no interest in the company. In cross-examination

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- A Rahman said that he was throughout, from the days of negotiation for the purchase until the business of the company ceased, acting as an adviser.
- B [26] As far as it may be relevant to the question of the capacity in which Kadir signed the second and third agreements, Kadir's evidence in examination-in-chief and in cross-examination is simply that Fatimah and he agreed to buy the shares but asked and authorised Rahman to handle the purchase for them because Kadir was living in Bukit Mertajam and Fatimah was a woman. Kadir maintained that he signed the agreements on behalf of himself and Fatimah and denied that he was Rahman's nominee for the signing of the agreements. Kadir claimed that Fatimah and he were the owners of the shares and that to buy the shares they borrowed money from Maybank.
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- D [27] The company records show that, after the 250,000 shares were sold, 145,000 shares were registered in Kadir's name and 105,000 in Fatimah's name. That was as at 31 December 1990. Later, 175,000 shares came to be in the name of Maybank (Nominees) Sdn Bhd and 75,000 shares in Kadir's name. That continued to be the position of the shareholding until after the
- E plaintiffs filed this action on 5 January 1994, when the 75,000 shares that had been in Kadir's name came to be in the name of Rahman's wife Zaitun (or Zaitun). As for directorship, at first the directors were Kadir and Fatimah. Othman, another brother of Rahman's, was a third director for a while. Then from December 1994 onwards, the directors were Fatimah and
- F Zaitun. To give a general picture of the fate of the company, I will mention that, according to Kadir, in 2000 Fatimah migrated to New Zealand, in 2000 and 2003 the building or buildings of the company were sold, in August 2003 the company ceased its business and in September 2003 the business was handed over to new owners.
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- H [28] I have not set out all the evidence pertaining to the payment for the shares because I do not think it is of assistance in determining whether Kadir signed the second and third agreements as Rahman's nominee. Neither is the evidence as to the registered ownership of the shares and the directorship of the company after the shares were purchased. That is because the shares and the directorship were in one family. Therefore the fact that Rahman was not registered in respect of any of the shares and was not a director and did not take part in the running of the company does not necessarily mean that it was not Rahman who was liable under the agreements as a contracting party and
- I that Kadir did not sign the agreements as Rahman's nominee. Neither does the fact, assuming that it is so, that Rahman did not pay for the shares. On the other hand, even if Rahman paid for the shares and the shares were his, it does not necessarily mean that Kadir signed the second and third agreements as Rahman's nominee and not in his own right as the purchasing

party. In the final analysis, the answer to the question rests on whether, as claimed by Haji Rahim and denied by Rahman, Rahman did tell Haji Rahim that he was bringing in Kadir to sign the second and third agreements. It requires me to come to a finding as to the comparative creditworthiness of Haji Rahim and Rahman.

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[29] I do not find anything in Haji Rahim's evidence that tends to bring into question Haji Rahim's creditworthiness. But I do find something in respect of which Rahman's creditworthiness is questionable. It concerns the holding of 75,000 shares by Rahman's wife Zaitun. Although, as I said, the state of shareholding per se is of no assistance in determining the question of Kadir's capacity in signing the second and third agreements, Rahman's evidence as to Zaitun's shareholding affects his creditworthiness, and although the evidence is not about Kadir's capacity in signing the agreements, it is the only obvious flaw that I find in Rahman's evidence and it is the only factor that is available to me by which to be persuaded that, in the matter of Kadir's capacity in signing the agreements, I should accept the evidence of Haji Rahim as, on a balance of probabilities, the truth.

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[30] As I have related, Kadir's 75,000 shares came to be in Zaitun's name and the directorship came to be held by Fatimah and Zaitun. Zaitun, whom the plaintiffs subpoenaed to give evidence as their witness, testified that she knew nothing about the 75,000 shares, that although she was a director she knew nothing about the business and all she did was to sign cheques when Fatimah asked her, that she knew that the 75,000 shares were in her name only on the day when she gave evidence, and that she did not know that she held the shares for Rahman her husband, but neither she did not hold them either for Kadir or Fatimah

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[31] Kadir, on the other hand, said in examination-in-chief that he transferred his 75,000 shares to Zaitun because, working with a company called 'KGN', he was not allowed under the banking law to hold shares. In cross-examination he said that he left the company because of a business conflict with Fatimah, which made him lose confidence in her. So he transferred his shares to Zaitun as his nominee. Asked why he did not transfer the shares to his own wife, he said that she did not know about business and he did not want her to have anything to do with Fatimah. He said that before the transfer he spoke to Zaitun several times on the telephone to explain to her why he needed to transfer his shares into her name.

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[32] As for Rahman, his evidence in cross-examination is that he did not know for whom his wife held the shares. As for his wife's evidence that she did not hold the shares for Kadir or Fatimah, Rahman said that she did not know anything and was confused when she gave the answer.

A [33] After considering together the evidence of Zaitun, Kadir and Rahman, I tend to the conclusion that each one of them was trying to hide the truth as to the ownership of the 75,000 shares. I cannot believe that Rahman did not know for whom his wife held the shares. On a balance of probabilities, the shares were held for Rahman. That is the obvious flaw in Rahman's evidence that I find affects his creditworthiness.

B [34] I am, therefore, as I said earlier, persuaded that, in the matter of Kadir's capacity in signing the agreements, I should accept Haji Rahim's evidence as, on a balance of probabilities, the truth. In my judgment Kadir signed the second and third agreements as Rahman's nominee and Rahman is liable under them.

C [35] The registrar will determine the claimability and correctness of the sums of RM15,000, RM539,612.02 and RM3,000, and to the amount or amounts consequently found due to the plaintiffs will add the agreed sum of RM120,000.

D [36] I order costs for the plaintiffs.

E *Plaintiffs' claim allowed with costs.*

Reported by Ashgar Ali Ali Mohamed

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